

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRADLEY VAN PATTEN, on
behalf of himself and all others
similarly situated,

Plaintiff,

VERTICAL FITNESS GROUP,
LLC a limited liability company,

Defendant.

CASE NO. 12cv1614-LAB (MDD)

**ORDER ON JOINT MOTION
FOR DETERMINATION OF
DISCOVERY DISPUTE
DENYING PLAINTIFF'S
MOTION TO COMPEL**

[ECF NO. 19]

Plaintiff initiated this lawsuit on behalf of himself and a putative class alleging that Defendant violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, and California law allegedly by sending Plaintiff and others unsolicited text messages regarding renewing membership in Defendant's fitness center. (ECF No. 1). Based upon the statements provided in the instant motion, it appears that there was a single text message sent to 30,354 former members of the Defendant's fitness centers by a third party contracted by Defendant.

Before the Court is the joint motion of the parties filed on April 26, 2013, to resolve a discovery dispute. (ECF No. 19). The motion itself is 105 pages and, with exhibits, the entire package is 292 pages. (*Id.*). At issue

1 are 17 Requests for Production of Documents (“RFPs”), many of which are
 2 substantially similar. Defendant objected generally and without specificity
 3 prompting a claim by Plaintiff that the responses were “boilerplate.”¹
 4 Ironically, Plaintiff appended to the discussion of each disputed RFP a
 5 section entitled “Plaintiff’s Analysis.” Except for identifying bates numbers
 6 for documents produced, this 3 page “analysis” is virtually identical for each
 7 of the 17 disputed RFPs. Boilerplate, indeed.

8 The joint motion consists of Plaintiff’s motion to compel further
 9 responses to RFP’s and Defendant’s responses. As provided below,
 10 Plaintiff’s motion to compel is **DENIED**.

11 Legal Standard

12 The Federal Rules of Civil Procedure generally allow for broad
 13 discovery, authorizing parties to obtain discovery regarding “any
 14 nonprivileged matter that is relevant to any party’s claim or defense.” Fed.
 15 R. Civ. P. 26(b)(1). Also, “[f]or good cause, the court may order discovery of
 16 any matter relevant to the subject matter involved in the action.” *Id.*
 17 Relevant information for discovery purposes includes any information
 18 “reasonably calculated to lead to the discovery of admissible evidence,” and
 19 need not be admissible at trial to be discoverable. *Id.* There is no
 20 requirement that the information sought directly relate to a particular
 21 issue in the case. Rather, relevance encompasses any matter that “bears
 22 on” or could reasonably lead to matter that could bear on, any issue that is
 23 or may be presented in the case. *Oppenheimer Fund, Inc. v. Sanders*, 437
 24 U.S. 340, 354 (1978). District courts have broad discretion to determine
 25

26 ¹ For example, in the first disputed RFP (No. 6), Plaintiff seeks “documents and
 27 ESI relating to the length of time Vertical Fitness has been operating fitness centers.”
 28 Among other things, Defendant objects on the ground that the request may include
 attorney-client privileged or work-product protected materials. No explanation is
 provided. That same objection, without explanation, is offered in every one of
 Defendant’s initial objections.

1 relevancy for discovery purposes. *See Hallett v. Morgan*, 296 F.3d 732, 751
 2 (9th Cir. 2002). Similarly, district courts have broad discretion to limit
 3 discovery where the discovery sought is “unreasonably cumulative or
 4 duplicative, or can be obtained from some other source that is more
 5 convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C).
 6 Limits also should be imposed where the burden or expense outweighs the
 7 likely benefits. *Id.*

8 A party may request the production of any document within the scope
 9 of Rule 26(b). Fed. R. Civ. P. 34(a). “For each item or category, the
 10 response must either state that inspection and related activities will be
 11 permitted as requested or state an objection to the request, including the
 12 reasons.” *Id.* at 34(b). The responding party is responsible for all items in
 13 “the responding party’s possession, custody, or control.” *Id.* at 34(a)(1).
 14 Actual possession, custody or control is not required. Rather, “[a] party
 15 may be ordered to produce a document in the possession of a non-party
 16 entity if that party has a legal right to obtain the document or has control
 17 over the entity who is in possession of the document. *Soto v. City of*
 18 *Concord*, 162 F.R.D. 603, 620 (N.D.Cal.1995).

19 Prior to certification of a class, some discovery regarding the class
 20 may be appropriate. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d
 21 935, 942 (9th Cir. 2009)(“Our cases stand for the unremarkable proposition
 22 that often the pleadings alone will not resolve the question of class
 23 certification and that some discovery will be warranted.”). Discovery likely
 24 is warranted where the requested discovery will resolve factual issues
 25 necessary for the determination of whether the action may be maintained
 26 as a class action. *Kamm v. California City Development Co.*, 509 F.2d 205,
 27 210 (9th Cir. 1975). Plaintiff carries the burden of making either a *prima*
 28 *facie* showing that the requirements of Fed.R.Civ.P. 23(a) to maintain a

1 class action have been met or “that discovery is likely to produce
2 substantiation of the class allegations.” *Mantolete v. Bolger*, 767 F.2d 1416,
3 1424 (9th Cir. 1985).

4 Discussion

5 Each of the disputed RFPs will be addressed below.

6 1. RFP 6

7 RFP 6 calls for the production of documents regarding the length of
8 time Defendant has been operating fitness centers. Among other things,
9 Defendant objected on the basis of relevance. Plaintiff has not provided any
10 explanation regarding relevance. The relevance is not obvious. Defendant
11 did produce certain documents based upon an agreement with Plaintiff
12 narrowing the scope of the request. Plaintiff has not presented any basis
13 for the Court to find the response inadequate. Defendant need not respond
14 further except as may be required under Fed.R.Civ.P. 26(e).

15 2. RFP 9

16 RFP 9 calls for the production of documents reflecting the terms of
17 membership by consumers. That request was narrowed by agreement to
18 the former members who received the text message forming the basis of
19 this suit. Defendant produced and has agreed to produce all of its
20 membership templates. It objects to producing the actual membership
21 agreements for the 30,354 former members who may have received the text
22 message as premature and unduly burdensome at this stage. Plaintiff has
23 not presented any evidence that it has a *prima facie* case for class
24 certification under Fed.R.Civ.P. 23(a) nor that this evidence is likely to
25 produce substantiation of the class allegations, as required under
26 *Mantolete*. Defendant need not respond further at this time.

27 3. RFP 10

28 RFP 10 calls for the production of all correspondence between

1 Defendant and third parties which distribute advertisements on
2 Defendant's behalf. Defendant has objected for overbreadth. This RFP is
3 overbroad. The Court will not rewrite it. Defendant has produced its
4 contract with the third party that sent the text messages and has agreed
5 to produce correspondence and billings related to the text message blast.
6 This is sufficient. Defendant need not respond further.

7 4. RFP 12

8 RFP 12 calls for the production of all documents supporting
9 Defendant's contention that Defendant is not liable to Plaintiff or the class.
10 Defendant has objected generally that this class-related discovery is
11 unwarranted at this stage. Defendant has produced the membership
12 contract between it and Plaintiff and has provided membership templates
13 used for other former members who may have received the text message
14 blast. The Court agrees that this contention RFP is inappropriate and finds
15 that Defendant's responses are sufficient. It encroaches upon the pretrial
16 disclosure obligations provided under Fed.R.Civ.P. 16 and, as discussed
17 above, calls for the production of class-related discovery without the
18 required showings under *Mantolete*. Defendant need not respond further
19 at this time.

20 5. RFP 13

21 RFP 13 calls for the production of documents supporting Defendant's
22 contention that Plaintiff and the class have not suffered damage.
23 Defendant has objected generally that this class-related discovery is
24 unwarranted at this stage. Defendant has produced the membership
25 contract between it and Plaintiff and has provided membership templates
26 used for other former members who may have received the text message
27 blast. The Court agrees that this contention RFP is inappropriate and finds
28 that Defendant's responses are sufficient. It encroaches upon the pretrial

1 disclosure obligations provided under Fed.R.Civ.P. 16 and, as discussed
2 above, calls for the production of class-related discovery without the
3 required showings under *Mantolete*. Defendant need not respond further
4 at this time.

5 6. RFP 15

6 RFP 15 calls for the production of documents regarding marketing
7 efforts involving sending text messages from January 1, 2008. Defendant
8 has objected for overbreadth and relevance. According to Defendant, the
9 request was narrowed during the meet and confer process to the contract,
10 correspondence, bills and payments related to the text message blast that
11 is the subject of this lawsuit. Those documents, according to Defendant
12 have been produced. No further response is required.

13 7. RFP 16

14 RFP 16 calls upon Defendant to produce documents identifying the
15 persons who received marketing text messages from Defendant from
16 January 1, 2008 to the present. Defendant objects on the grounds that this
17 is unwarranted class discovery in the absence of class certification.
18 Plaintiff has not presented any evidence showing that it has a *prima facie*
19 case for class certification under Fed.R.Civ.P. 23(a) nor that this evidence
20 is likely to produce substantiation of the class allegations, as required
21 under *Mantolete*. Defendant need not respond further at this time.

22 8. RFP 17

23 RFP 17 calls for the production of the telephone numbers of persons
24 who received marketing text messages from January 1, 2008 to the present.
25 As provided at RFP 16 above, no further response is required at this time.

26 9. RFP 20

27 RFP 20 calls for the production of documents reflecting the method of
28 choosing recipients of the text message blast. Defendants have objected on

1 grounds of relevance, among other things. Plaintiff has proffered no
2 showing of relevance. This case involves whether Plaintiff received an
3 unsolicited commercial text message and whether Defendant has evidence
4 that he consented to receiving such messages. The manner in which
5 Plaintiff was selected to receive a text message is not relevant. No response
6 is required.

7 10. RFP 21

8 RFP 21 calls for the production of documents between Defendant and
9 any third party regarding sending text messages as part of marketing
10 efforts. See RFP 15. No further response is required.

11 11. RFP 22

12 RFP 22 calls for the production of any communications regarding
13 sending text messages as part of marketing efforts. This appears to include
14 any internal communications of Defendant. Defendant has objected for
15 relevance and on other grounds. Plaintiff has proffered no showing of
16 relevance. This case involves whether Plaintiff received an unsolicited
17 commercial text message and whether Defendant has evidence that he
18 consented to receiving such messages. Communications regarding the
19 marketing program generally are not relevant. No further response is
20 required.

21 12. RFP 23

22 RFP 23 calls for the production of documents reflecting consent of
23 persons who received the text message. Defendant objects on the grounds
24 that this is unwarranted class discovery in the absence of class certification.
25 Plaintiff has not presented any evidence showing that it has a *prima facie*
26 case for class certification under Fed.R.Civ.P. 23(a) nor that this evidence
27 is likely to produce substantiation of the class allegations, as required
28 under *Mantolete*. Defendant has produced the membership agreement

1 templates and the entire agreement for Plaintiff. Defendant need not
2 respond further at this time.

3 13. RFP 24

4 RFP 24 calls for the production of telephone numbers sent the text
5 message blast. Defendant objects on the grounds that this is unwarranted
6 class discovery in the absence of class certification. Plaintiff has not
7 presented any evidence showing that it has a *prima facie* case for class
8 certification under Fed.R.Civ.P. 23(a) nor that this evidence is likely to
9 produce substantiation of the class allegations, as required under
10 *Mantolete*. Defendant has produced the membership agreement templates
11 and the entire agreement for Plaintiff. Defendant need not respond further
12 at this time.

13 14. RFP 25

14 RFP 25 calls for the production of documents reflecting the identities
15 of persons who received the text message blast. Defendant objects on the
16 grounds that this is unwarranted class discovery in the absence of class
17 certification. Plaintiff has not presented any evidence showing that it has
18 a *prima facie* case for class certification under Fed.R.Civ.P. 23(a) nor that
19 this evidence is likely to produce substantiation of the class allegations, as
20 required under *Mantolete*. Defendant has produced the membership
21 agreement templates and the entire agreement for Plaintiff. Defendant
22 need not respond further at this time.

23 15. RFP 26

24 RFP 26 calls for the production of documents reflecting the
25 relationship of Defendant to Gold's Gym. Defendant has produced
26 documents. Plaintiff has not addressed the adequacy of the documents
27 produced. Instead, Plaintiff offers the same boilerplate "analysis"
28 submitted in connection with every disputed RFP. Plaintiff has not

1 presented any basis for the Court to find the response inadequate.
2 Defendant need not respond further except as may be required under
3 Fed.R.Civ.P. 26(e).

4 16. RFP 27

5 RFP 27 calls for the production of documents regarding Defendant's
6 storage of electronic information. Defendant has objected for relevance,
7 overbreadth and burden. Plaintiff responds with its standard "analysis"
8 and adds that the RFP is directed in discovering how Defendant stores its
9 information and in what mediums Plaintiff can expect disclosure. First,
10 this issue should have been addressed during the parties' Rule 26(f)
11 conference. And, in the absence of any real dispute regarding the manner
12 of production of electronically stored information, this RFP lacks relevance.
13 No response is required.

14 17. RFP 29

15 RFP 29 calls for the production of documents reflecting contracts
16 between Defendant and Gold's Gym. Defendant has produced documents.
17 Plaintiff has not addressed the adequacy of the documents produced.
18 Instead, Plaintiff offers the same boilerplate "analysis" submitted in
19 connection with every disputed RFP. Plaintiff has not presented any basis
20 for the Court to find the response inadequate. Defendant need not respond
21 further except as may be required under Fed.R.Civ.P. 26(e).

22 Conclusion

23 For the foregoing reasons, Plaintiff's motion to compel further
24 responses to requests for production is **DENIED**.

25 IT IS SO ORDERED.

26 DATED: May 7, 2013

27 
28 Hon. Mitchell D. Dembin
 U.S. Magistrate Judge